91-171

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DAVID NEIL,

Petitioner,

v.

DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER, and the judge assigned to preside over case no. C-75784,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 29, 1991

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QUESTION PRESENTED FOR REVIEW

Whether federal jurisdiction exists over a 42 U.S.C. § 1983 action seeking to prevent a state trial court from a future act of irreparably infringing a citizen's federal, immunity-based right not to stand trial against a federal claim brought in said state court.

LIST OF PARTIES

In addition to the parties set forth in the caption, the following parties are also involved in the case below: Andrew Espinoza, Jeannie Espinoza, Judith Espinoza, Arthur Espinoza, Jr., Mary Espinoza, Beverly Espinoza and the City and County of Denver.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of *certiorari* issue to review the order of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 29, 1991.

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit issued an unpublished order and judgment (found in Appendix B), one judge dissenting, affirming the district court's order (found in Appendix A) which

dismissed the action below for lack of subject-matter jurisdiction.

JURISDICTION

Petitioner commenced the within action seeking to enjoin respondent state trial court from irreparably infringing upon his federal right by reason of his qualified immunity not to stand trial against claims arising under 42 U.S.C. § 1983 brought in respondent court. The U.S. District Court for the District of Colorado misconstrued the nature of this action and dismissed the suit *sua sponte* on the misplaced grounds that the federal district court did not have subject matter jurisdiction "to review" the state court decision.

Petitioner brought timely appeal to the Tenth Circuit Court of Appeals which issued its unpublished order and judgment on April 29, 1991, affirming the district court order. This petition for *certiorari* is filed within 90 days of that date.

The jurisdiction of this Court to review the order of the United States Court of Appeals for the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Amendment Fourteenth, § 1: . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes it to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights and privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

STATEMENT OF THE CASE

The claims brought in respondent court arise from the shooting death on July 30, 1977, of Arthur Espinoza by petitioner, David Neil, a Denver, Colorado police officer. The decedent's six children (the intervenors below) assert personal claims under 42 U.S.C. § 1983 based solely on the denial of their purported constitutionally protected right to associate with their father – decedent's constitutional right to life is not implicated in any claim.

The following facts are essentially uncontradicted and are derived exclusively from prior trial testimony in this matter:

The events began with a call to the Denver Police Department regarding a family fight at decedent's residence. The officers further understood that decedent was wanted regarding a possible homicide and that he had a gun. Responding officers, including petitioner, eventually located decedent in a park near decedent's home. As two plainclothes detectives (non-parties herein) entered the park on foot, they observed decedent and his companion,

James Hinojos, lying on the ground and further observed decedent pass a gun to Hinojos. Petitioner, in uniform, arrived separately at the scene driving a marked police car to within a few feet of decedent and Hinojos, just as the detectives began shooting at Hinojos. Petitioner opened his car door, took aim behind it and fired once at decedent because he believed decedent at that time was reaching for a gun tucked in his waistband. This single shot fired by petitioner caused decedent's death.

The children originally brought various claims, including § 1983 claims, against petitioner, the two detectives (John O'Dell and Gary Graham) and the City and County of Denver. At that time the trial court granted a motion to dismiss the § 1983 claims. The Colorado Supreme Court reversed in *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), recognizing in unprecedented fashion a child's constitutionally protected right of association with his father. This Court granted *certiorari* regarding whether such a right exists. *O'Dell v. Espinoza*, 454 U.S. 1122 (1981). After oral argument, this Court dismissed for want of jurisdiction. 456 U.S. 430 (1982). The case was remanded for trial, after which judgment was rendered against petitioner. On appeal from that judgment, the Colorado Supreme Court reversed on the basis of an improper verdict and remanded for a new trial. *See Neil v. Espinoza*, 747 P.2d 1257 (Colo. 1987).

Petitioner then moved in the trial court for summary judgment on the basis of his qualified immunity, contending (1) that the children's associational rights were not clearly established at the time of the incident; (2) that assuming such rights clearly existed, the children admittedly could not prove that petitioner possessed a specific

intent to interfere with those rights, as required by the Tenth Circuit in *Trujillo v. Board of County Commissioners*, 768 F.2d 1186, 1190 (10th Cir. 1985); and (3) petitioner's actions were objectively reasonable as a matter of law under the test set forth in *Anderson v. Creighton*, 483 U.S. 635 (1987), and consistent with the principles delineated by this Court in *Graham v. Connor*, 490 U.S. 386 (1989).

The trial court denied petitioner's summary judgment motion and after a timely interlocutory appeal pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Colorado Court of Appeals dismissed for lack of a final, appealable judgment. The Colorado Supreme Court denied *certiorari* and thereafter this Court denied *certiorari*. *See Neil v. Espinoza*, ___ U.S. ___, 110 S.Ct. 1134, 107 L.Ed.2d 1039 (1990).

Petitioner then filed his own § 1983 action against respondents in the U.S. District Court for the District of Colorado, Case No. 90-C-998, seeking to enjoin respondents from compelling petitioner to stand trial, on grounds that such would irreparably harm petitioner by infringing his immunity-based federal right not to stand trial. Thus, petitioner was seeking relief in the nature of enjoining the state court from committing this future act. The federal district court erroneously dismissed the matter *sua sponte* on grounds that it lacked subject matter jurisdiction, premising its decision on the mischaracterization of the suit as seeking "review" of the state court decision. *See* Appendix A. After timely appeal to the Tenth Circuit Court of Appeals, that court issued an unpublished order and judgment, with one judge dissenting, affirming the district court's order. *See* Appendix B.[1]

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[1] The Tenth Circuit in affirming the district court erroneously concluded that abstention was an alternative basis for

(Continued on following page)

Petitioner, as a result, is compelled to go to trial in respondent court commencing on March 2, 1992, which will result in irreparable harm to petitioner's federally protected right unless this Court acts.

(Continued from previous page)

the district court's dismissal. *See* Appendix B-2; *cf.* Appendix A-5, 6. In any event, abstention would not be warranted. Abstention is appropriate (1) where "the State [has] a legitimate, substantial interest in its pending proceedings," or (2) the plaintiff has not exhausted his state appellate remedies before seeking relief in the District Court; "[a]bstention is not appropriate if the federal plaintiff will 'suffer irreparable injury' absent equitable relief." *See New Orleans Public Service v. Council of New Orleans*, ___ U.S. ___, 109 S.Ct. 2506, 2516-18, 105 L.Ed.2d 298 (1989). It is the federal interest, not the state interest, that is legitimate and substantial herein because "[t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees," *id.* at 2516, such as Officer Neil's guarantees under *Mitchell* and under the Privileges or Immunities Clause. The preeminent interest herein concerns the uniform application § 1983 claims, whether the forum be state or federal. *See Felder v. Casey*, 487 U.S. 131, 144 (1988) (" 'Congress . . . surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential element of a federal cause of action' "). Thus, the federal interest herein addresses the same question of forum shopping decided in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), because, in Colorado, the § 1983 claims brought by the children against petitioner are recognized by the Colorado Supreme Court but would be barred by the Tenth Circuit. *See, supra*, at 4-5. That irreparable injury will result and that petitioner has exhausted his state remedies are demonstrated *infra*; clearly, the Tenth Circuit erred in affirming dismissal on grounds of abstention.

REASONS FOR GRANTING THE WRIT

The Decision Below Either Conflicts With The Decision Of This Court In *Mitchum v. Foster* Or Presents An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The issue in this case focuses on the nature of the relief sought by petitioner in the U.S. District Court. By asserting an entitlement to injunctive relief under 42 U.S.C. § 1983, petitioner seeks only to prevent a state actor (the state district court) from violating his federal right not to stand trial because he has qualified immunity and, without injunctive relief, such right will be irreparably lost. Thus, it is not a "disguised attempt to gain federal court review of [a] state court judgment," as the district court concluded. *See* Appendix A-3. Instead, it is the *only* means available to petitioner to prevent irreparable injury to his federal, immunity-based right.

Indeed, the necessity for exercising federal jurisdiction in this context is heightened by the fact that petitioner has no interlocutory appellate remedy available to him in the Colorado appellate system to protect his immunity-based federal right not to stand trial. The Colorado appellate courts have refused to exercise such appellate jurisdiction over the denial of immunity notwithstanding this Court's clear directive that such an interlocutory appeal is the only way to protect one's federal right not to stand trial. *See Mitchell*, 472 U.S. at 525-26.

The relief petitioner seeks is substantially similar to that recognized by this Court in *Mitchum v. Foster*, 407 U.S. 225, 227 (1972), in which this Court recognized the propriety of enjoining a state court's future action where

the state court sought to deny the petitioner's First Amendment rights. Consequently, the reliance of the courts below upon *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and its progeny is misplaced because petitioner herein seeks merely to prevent *future action* by a state court and does not seek to reverse a final judgment of the state court through federal appellate review.

Conceptually, the subject-matter jurisdiction sought herein is virtually identical to that regarding the Double Jeopardy Clause. *See Mitchell*, 472 U.S. at 525. *See also Stewart v. Donges*, 915 F.2d 572, 577 n.5 (10th Cir. 1990) ("interlocutory double jeopardy appeals are 'so closely parallel to [*Mitchell v.*] *Forsyth* appeals that the principles are freely transferrable' "). In short, absent federal court intervention herein, petitioner's federal right not to stand trial will be irreparably lost without access to any appellate remedy.

The jurisdictional basis for such relief is firmly rooted in the purpose of the Fourteenth Amendment and in its corresponding enacting statute, 42 U.S.C. § 1983. As this Court stated in *Mitchum*,

> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th Century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative or *judicial*."

Id., 407 U.S. at 242 (emphasis added).

The right not to stand trial because of one's qualified immunity has an additional constitutional basis in the Fourteenth Amendment which provides that "[n]o State shall make or enforce any law which shall abridge the privileges *or immunities* of citizens of the United States . . . " (emphasis added).[2] This Court first discussed the Privileges or Immunities Clause in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), which concerned solely "privileges"; no court has interpreted the phrase "or immunities" as that phrase stands alone even though the tradition of immunity was firmly rooted in the common law at the time § 1983 and the Fourteenth Amendment were enacted. *See Owen v. City of Independence*, 445 U.S. 622, 637 (1980) ("a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that [the post-bellum] 'Congress would have specifically so provided had it wished to abolish the doctrine' ").

The legislative history of the Civil Rights Acts reflects that the post-bellum Congress understood immunity consistent with that set forth in *Mitchell v. Forsyth*:

> But what of the term "immunities?" What is an immunity? Simply "freedom or exemption from obligation." An immunity is "a right of exemption only" as "an exemption from serving in an office, or performing duties which the law generally requires other citizens to perform." This is all that is intended by the word "immunities" as used in this bill.

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[2] As with deprivations of privileges, the Amendment focuses on a State's deprivation of federal rights, precisely the issue herein.

Cong. Globe, 39th Cong., 1st Sess. (1866), at 1117. Finally, consistent with instruction in the *Slaughter-House Cases*, the State of Colorado has specifically recognized the common-law right of qualified immunity asserted herein. *See Cooper v. Hollis*, 42 Colo.App. 505, 600 P.2d 109, 111 (1979).

Thus, as in *Mitchum*, petitioner can protect his right not to stand trial in the instant case *only* by means of federal intervention; in this context, the courts below erred in finding no jurisdiction.

CONCLUSION

This petition raises a fundamental issue of federalism requiring the intervention of this Court. The federally protected right not to stand trial where one has qualified immunity requires protection from irreparable harm that will be caused by the state trial court. Where the state appellate system is not available to prevent such irreparable injury to petitioner's federal right, then federal jurisdiction is mandated because petitioner is left with no other remedy. The question of whether federal jurisdiction may be asserted to prevent a state court from irreparably infringing upon an individual's federal, immunity-based right not to stand trial against a federal claim is an important question that, if not resolved by this Court's prior decision in *Mitchum*, must be resolved by this Court in the instant matter. If this issue was resolved in *Mitchum*, then the decision of the court below conflicts with that decision. On either basis, it is respectfully submitted

that a writ of *certiorari* should issue to review the order and judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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Date: July 29, 1991

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 90-C-998

DAVID NEIL,

Plaintiff,

v.

DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER, AND THE HONORABLE SANDRA ROTHENBERG,

Defendants.

MEMORANDUM OPINION AND ORDER

CARRIGAN, J.

Plaintiff David Neil, the defendant in a civil rights action currently pending in the state District Court in and for the City and County of Denver, Colorado, commenced this civil rights action seeking to enjoin the defendant court from requiring him to stand trial. He also seeks an order declaring that he is immune from § 1983 damage claims. Plaintiffs in the state case have intervened as defendants ("the intervenors"). Defendant and the intervenors have moved to dismiss. Because I have concluded, *sua sponte*, that this court lacks subject matter jurisdiction and the case must be dismissed, I need not rule on the defendants' motions.

I. General Background.

On July 30, 1977, Neil, while on duty as a Denver police officer, shot and killed Arthur Espinoza. Later that year the intervenors commenced a § 1983 action against Neil and others in the state District Court in and for the County of Denver, Colorado. Neil and his co-defendants moved for summary judgment. That motion was granted, but the Colorado Supreme Court reversed and remanded for trial. *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981). The United States Supreme Court initially granted *certiorari*, but later dismissed the petition for lack of a final judgment.

In April 1985, the case was tried to a jury, which returned a verdict against Neil. Because of an irregularity in the return of the verdict, the Colorado Supreme Court reversed the judgment and remanded the case for a new trial. *Neil v. Espinoza*, 747 P.2d 1257 (Colo. 1987). Prior to the second trial, Neil moved for summary judgment asserting that he is immune from § 1983 damage claims. The state district court denied the motion. Neil appealed to the Colorado Court of Appeals which dismissed the appeal for lack of an appealable judgment. After the Colorado Supreme Court and the United States Supreme Court denied his *certiorari* petitions, Neil commenced this action.

II. Discussion.

Neil asserts that this "case is an original civil action seeking protection from deprivation of Plaintiff's rights . . . that *will* occur if this Court does not intercede." Plaintiff's response to defendants' motion to dismiss at 2.

(Emphasis in original.) The Supreme Court long ago defined the difference between original proceedings, and those, although styled as original proceedings, which actually are disguised attempts to gain federal court review of state court judgments.

> "The question presented with regard to . . . jurisdiction . . . is, whether the proceeding . . . is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissable.
>
> On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines v. Fuentes* (92) U.S. [2 Otto] 10 [23 L.Ed. 524]) the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or the legality and correctness of the judgments and decrees of the

> State courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or the party's right to claim any benefit by reason thereof." *Barrow v. Hunton*, 99 U.S. (9 Otto) 80, 82-83 (1878).

A cursory review of the allegations in Neil's complaint and the prayer for relief shows that Neil is challenging the legality of the state court's denial of his summary judgment motion and subsequent appeals.

The Tenth Circuit has recognized that federal courts lack subject matter jurisdiction to hear cases such as this one. "It is well settled that federal district courts are without authority to review state court judgments where the relief sought is *in the nature of appellate review*. Where a constitutional issue could have been reviewed on direct appeal by the state appellate courts, a litigant may not seek to reverse or modify the state court judgment by bringing a constitutional claim under 42 U.S.C. § 1983 (1982)." *Anderson v. State of Colorado*, 793 F.2d 262, 263 (10th Cir. 1986) (emphasis added) (citations omitted). The court there made clear that both direct appeals to a federal court and appeals cloaked as civil rights complaints are beyond this court's subject matter jurisdiction.

Anderson can be distinguished because, unlike Neil, the plaintiff there had not appealed the state court decision through the Colorado courts and the United States Supreme Court. This distinction, however, does not render *Anderson* inapplicable. The Tenth Circuit declared that relief in the state court system, followed by a petition for review in the United States Supreme Court, is such a party's *sole* recourse, and not merely a prerequisite to

federal court review. "Mr. Anderson's recourse, if any, is to exhaust his appeals in the Colorado courts and to petition the Supreme Court of the United States for certiorari review of the decision of the state supreme court." *Id.* at 264.

This circuit is not alone in concluding that the federal courts are without subject matter jurisdiction to hear cases styled as § 1983 claims, that are actually efforts by disappointed state court litigants to seek appellate review. *See Staley v. Ledbetter*, 837 F.2d 1016 (11th Cir. 1988) (federal court lacks jurisdiction to hear § 1983 case that in essence seeks to reverse state court decision); *Reynolds v. State of Georgia*, 640 F.2d 702 (5th Cir.), *reh'g denied*, 645 F.2d 72 (1981), *cert. denied*, 454 U.S. 865 (1981) (relief sought in § 1983 action effectively appellate review, therefore beyond federal court jurisdiction); *Fortune v. Mulherrin*, 533 F.2d 21 (1st Cir. 1976) (federal courts do not review state court civil proceedings under guise of Civil Rights Act).

Even if this court had jurisdiction, Neil could not obtain the relief he seeks. He asserts that because he is shielded by qualified immunity, his constitutional right not to defend against the intervenors' civil rights complaint will be violated unless this court intercedes. Plaintiff ignores a basic fact. Before I could grant Neil the relief he seeks, I would have to determine if he was immune at the time of the conduct in issue. As Neil pointed out in his state court summary judgment motion, to establish qualified immunity, I would have to decide whether his actions were objectively reasonable. *Anderson v. Creighton*, 107 S.Ct. 3034 (1987). This determination could only be made after discovery and an evidentiary hearing. In

essence, a "mini-trial" would be required to determine whether Neil is immune. Trial is precisely what Neil seeks to avoid. In addition, if I were to conclude that Neil's actions were not objectively reasonable, he would be collaterally estopped from relitigating this issue in the subsequent state court trial.

Accordingly IT IS ORDERED that the plaintiff's complaint and action are dismissed.

Dated at Denver, Colorado August 30, 1990.

BY THE COURT:

/s/ Jim R Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DAVID NEIL, Plaintiff-Appellant, v. DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER; JUDGE ASSIGNED TO PRESIDE OVER CASE NO. C-75784, Defendants-Appellees, ANDREW ESPINOZA; JEANNIE ESPINOZA; ARTHUR ESPINOZA, JR.; BARRY ESPINOZA; JUDITH ESPINOZA; BEVERLY ESPINOZA, Intervenors-Appellees.	)	No. 90-1287 (D.C. No. 90-C-998) (D. Colo.)

ORDER AND JUDGMENT*

Before MCKAY, SEYMOUR, and EBEL, Circuit Judges.

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*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

David Neil brought this action under 42 U.S.C. § 1983 (1988) requesting injunctive and declaratory relief. Neil, who is a defendant in a civil rights action currently pending in state court, seeks to enjoin the state court from requiring him to stand trial.

The federal district court concluded that the action should be dismissed on two alternative grounds. First, the court held that a federal district court is without subject matter jurisdiction to hear cases brought under section 1983 that in essence seeks to review and reverse state court decisions. Second, the district court concluded that, even if it had subject matter jurisdiction, abstention would be warranted to avoid undue interference with the ongoing state proceeding.

We have considered the parties' contentions on appeal, and we are not persuaded that the district court's judgment is erroneous. Accordingly, the judgment is AFFIRMED. However, appellees' motions for sanctions for filing a frivolous appeal are denied.

Judge McKay dissents.

The mandate shall issue forthwith.

Entered for the Court

Stephanie K. Seymour
Circuit Judge